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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN WILLOUGHBY FRASER, Defendant and Appellant.	H025138 (Santa Clara County Super. Ct. No. 190444)

Defendant John Willoughby Fraser appeals after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600, et seq.).[1] The trial court committed him to the jurisdiction of the Department of Mental Health for a two-year term. This commitment was an extension of two prior two-year commitments under the SVPA.

On appeal, defendant contends: (1) there was no probable cause to hold him for trial; (2) the trial court erred by failing to instruct the jury that it had to find that defendant suffered from a mental condition that caused him to have "serious difficulty" in controlling his behavior; (3) there was insufficient evidence that defendant suffered from a mental condition that caused him to have "serious difficulty" in controlling his

[1] Unspecified section references are to the Welfare and Institutions Code.

sexually violent "predatory" behavior; and (4) the errors were cumulatively prejudicial. We will affirm the judgment.

I. BACKGROUND

In 1979, defendant pled guilty to one count of lewd and lascivious conduct upon a child under the age of 14. (Pen. Code, § 288, subd. (a).) He had been charged with molesting his 12-year-old step-daughter as well as her 12-year-old friend, but he pled only to the charge involving his step-daughter's friend. He had molested the girls during a strip poker game. On two other occasions, he had fondled the friend and exposed himself to her. After pleading guilty, defendant was placed on probation, with a suspended prison term of three years.

In 1982, defendant was charged with conspiracy to commit pandering, pandering, and prostitution. He had been running a house of prostitution. Defendant was convicted of pandering. (Pen. Code, § 266.) He was sentenced to a three-year prison term, which was partly based on his violation of probation for the 1979 offense.

In 1989, defendant pled guilty to four counts of lewd and lascivious conduct upon a child under the age of 14. (Pen. Code, § 288, subd. (a).) The four offenses involved two different victims, but there was evidence of defendant's sexual conduct with four boys between the ages of 9 and 14 years. Defendant showed the boys pornographic movies "to make them more receptive to sexual contact." He also committed sex acts against one of the boys on driving trips. Defendant's conduct included orally copulating the boys, masturbating the boys, and having the boys touch him. Defendant was sentenced to a prison term of 15 years for these convictions.

In 1997, defendant was found to be an SVP and was committed under the SVPA for a two-year term at Atascadero State Hospital. At the expiration of that term in 1999, the Santa Clara County District Attorney filed a petition to extend defendant's commitment for two more years. A jury found defendant to be an SVP and the trial court committed him to Atascadero State Hospital for a second two-year term. On June 27,

2001, the Santa Clara County District Attorney filed another petition to extend defendant's commitment for two more years.

A probable cause hearing was held on January 9, 2002. (§ 6602.) The People submitted two reports at the probable cause hearing: one from Dr. Dawn Starr, dated March 30, 2001; the other from Dr. Wesley Maram, dated May 25, 2001. The People rested after submission of the reports, but defendant subpoenaed both doctors to testify. At the conclusion of the probable cause hearing, the trial court found probable cause to hold defendant for trial.

At trial, Dr. Dawn Starr, a psychologist, testified as an expert in the diagnosis and recidivism of sex offenders. Dr. Starr had evaluated defendant in 2000 and 2002. She had interviewed defendant and reviewed his records. Dr. Starr diagnosed defendant with pedophilia and a personality disorder. She based the pedophilia diagnosis "not only" on defendant's prior sex offenses, but also on his 1997 statement that "eight-year-old girls are mature enough emotionally to enjoy sex"; his acknowledgement that a " 'deep psychological disorientation' " contributed to his behavior; the fact that the conduct underlying the 1989 convictions lasted for a long period of time (approximately one year); and his "early sexual contact with other children" (referring to sexual conduct when he was between the ages of 6 and 11 years old).

Dr. Starr opined that defendant's pedophilia caused him to suffer volitional impairment. She came to this conclusion because defendant had committed sex offenses while acknowledging that his behavior was wrong and while being aware that he could be incarcerated for that conduct. Dr. Starr opined that defendant had serious difficulty controlling his behavior and that he was likely to engage in sexually violent predatory criminal behavior without appropriate treatment and custody. She had used the Static 99 instrument to calculate defendant's likelihood of reoffending. Defendant scored a six, which put him into the high-risk category. Dr. Starr also determined that in defendant's

case, there were additional risk factors present (i.e., factors that are not included in the Static 99 instrument).

Dr. Wesley Maram, another psychologist, also testified at trial as an expert in the diagnosis of mental disorders and the recidivism of sex offenders. Dr. Maram evaluated defendant in 2001. He, too, diagnosed defendant with pedophilia and a personality disorder. Dr. Maram based the pedophilia diagnosis on defendant's history of sexually molesting children, the time span of that behavior, and defendant's statements indicating he had sexually arousing urges. Dr. Maram noted that defendant acknowledged feeling badly about his conduct and acknowledged knowing that what he was doing violated the law and subjected him to punishment. Dr. Maram opined that because defendant's judgment was overcome by his sexual arousal, the pedophilia had affected his volitional capacity. Defendant's inability to control his behavior was further indicated by his past statement, " 'The need to just have somebody gets to be overpowering.' "

Dr. Maram opined that there was a "substantial likelihood" that defendant would reoffend without appropriate treatment and custody. Like Dr. Starr, Dr. Maram found that defendant scored in the high-risk category on the Static 99 instrument, and that additional risk factors indicated he was likely to reoffend.

The People called defendant to testify at trial. Defendant, who was 64 years old at the time of trial, acknowledged he had suffered various convictions for prior non-sexual criminal conduct and served time in prison for those offenses, prior to his commission of the 1979 sex offenses. Defendant acknowledged that he knew his sexual conduct with the two 12-year-old girls was wrong at the time.

Defendant asserted that if he was released he was at no risk of sexually offending with children. He denied having any sexual urges concerning young girls or boys.

Defendant presented no evidence at trial.

The jury found the SVPA petition true on July 29, 2002. The trial court ordered defendant committed to the Department of Mental Health for two years, commencing on

July 29, 2001 (the date his previous commitment expired). Thus, the commitment that is the subject of this appeal expired on July 29, 2003.[2]

II. DISCUSSION

A. Probable Cause Finding

Defendant contends that the evidence at the probable cause hearing did not establish probable cause to believe that defendant was "likely to engage in sexually violent predatory criminal behavior" upon his release. (§ 6602, subd. (a).)

"A determination of probable cause by a superior court judge under the SVPA entails a decision whether a reasonable person could entertain a strong suspicion that the offender is an SVP." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 252, italics omitted.) "[A]t the probable cause hearing the superior court must find probable cause to believe that a potential SVP presents a serious and well-founded risk of committing sexually violent criminal acts that will be of a predatory nature." (*Id.* at p. 256, italics omitted.)

The People claim that defendant should have raised this issue by seeking pretrial review of the trial court's probable cause determination, citing the rule of *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519 (*Pompa-Ortiz*): that an error at a preliminary hearing in a criminal proceeding requires reversal only if the defendant makes a showing "that he was denied a fair trial or otherwise suffered prejudice." (*Id.* at p. 530.)

This court applied *Pompa-Ortiz* in the context of SVPA proceedings in *People v. Butler* (1998) 68 Cal.App.4th 421 (*Butler*), where we explained: "While *Pompa-Ortiz* was a criminal case, and proceedings under the SVP law are not criminal in nature [citation], its rationale has been applied in other cases involving pretrial civil

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[2] The parties indicate that another petition to extend defendant's commitment was filed on June 27, 2001. Although the issues in this appeal are technically moot, we will exercise our discretion and address them. (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1190 (*Hurtado*).)

proceedings." (*Id.* at p. 435.) In *Butler*, we concluded that the trial court had erred by denying the defendant's motion to confront and call witnesses at his probable cause hearing. However, because the defendant failed to seek pretrial review of the trial court's ruling and he was "found to be an SVP after a trial at which he was able to cross-examine the prosecution's witnesses and call his own witnesses," he did not make the showing of prejudice requiring reversal under *Pompa-Ortiz*. (*Ibid.*)

Defendant claims that the *Pompa-Ortiz* prejudice requirement is not applicable here because the error was "jurisdictional in the fundamental sense." (*Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) He points out that the commitment petition would have been dismissed and he would have been released from custody had the trial court found no probable cause, thereby depriving the People of authority to hold him for trial. (See § 6602, subd. (a).)

In *People v. Alcala* (1984) 36 Cal.3d 604, the Supreme Court rejected a similar argument. There, the defendant claimed on appeal that the trial court had erred by denying his Penal Code section 995 motion to dismiss the information on grounds that probable cause had not been established at the preliminary hearing. As here, the defendant in *Alcala* suggested that "a failure of evidence at the preliminary hearing is a jurisdictional defect." (*People v. Alcala, supra,* 36 Cal.3d at p. 628.) The court stated: "An evidentiary deficiency at the preliminary hearing does not meet that standard. The statutes have long provided that lack of probable cause at the preliminary hearing is waived *for all purposes* if not timely pursued prior to trial. [Citations.] It follows that a failure of probable cause is not an unwaivable 'jurisdictional' defect in the commitment which warrants reversal, or a quashing of the information, even though defendant's trial was fair." (*Ibid.*)

Defendant argues that even if the trial court's alleged error was not "jurisdictional in the fundamental sense" (*Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529), he has made the required showing of prejudice: he claims he was prejudiced by the fact that he was held

for trial rather than being released. A similar argument was presented in *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830 (*Waller*). In that case, the trial court denied the corporate defendant's motion for summary judgment, finding a triable issue of material fact. (See Code Civ. Proc., § 437c.) The matter proceeded to jury trial and the jury decided in favor of the plantiffs. On appeal, the defendant argued that the trial court should have granted its motion for summary judgment. The defendant argued that it had been prejudiced, because "if its summary judgment motion had been granted, the matter would have been terminated in its favor at that point, there would have been no trial and it would not now be faced with an adverse judgment." (*Waller, supra*, 12 Cal.App.4th at p. 833.) The court rejected this logic, citing various civil cases as well as the rule of *Pompa-Ortiz:* "In each of these examples, if the correct ruling had been made, the appellant would have prevailed and no trial would have followed; nevertheless, an erroneous ruling is not cause for reversal after trial because there is no prejudicial effect on the trial. Thus we reject defendant's theory that merely being compelled by force of an erroneous denial of a dispositive pretrial motion to participate in an otherwise fair trial constitutes prejudice warranting reversal." (*Id.* at p. 834.)

The rationale of *Waller* is applicable here. Reversal is not required on the basis of the trial court's alleged error in finding probable cause. The fact that defendant was compelled to "participate in an otherwise fair trial" does not demonstrate prejudice. (*Waller, supra*, 12 Cal.App.4th at p. 834.) We therefore need not consider whether there was in fact probable cause to hold defendant for trial.

B. Failure to Instruct on "Serious Difficulty"

In *Kansas v. Crane* (2002) 534 U.S. 407, the United States Supreme Court considered the Kansas Sexually Violent Predator Act, and held the state does not need to prove a "*total* or *complete* lack of control" but rather "proof of serious difficulty in controlling behavior." (*Id*. at pp. 411, 413.) Defendant argues the jury should have been

specifically instructed it needed to find appellant had "serious difficulty in controlling behavior." (*Id*. at p. 413.) Even more specifically, defendant argues, the jury should have been instructed that it had to find that defendant had serious difficulty in controlling his sexually *predatory* behavior.

Here, the jury was instructed on the meaning of the phrase "sexually violent predator" pursuant to CALJIC No. 4.19, which follows the statutory definition contained in section 6600. The instruction read as follows: "The term 'sexually violent predator' means a person who, one, has been convicted of a sexually violent offense against two or more victims for which he received a grant of probation or a determinate sentence, and two, has a diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely that he will engage in sexually violent predatory behavior. [¶] … [¶] 'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others. . . ."

Recently, in *People v. Williams* (2003) 31 Cal.4th 757 (*Williams*), the California Supreme Court concluded that "a commitment rendered under the plain language of the SVPA necessarily encompasses a determination of serious difficulty in controlling one's criminal sexual violence, as required by *Kansas v. Crane, supra,* 534 U.S. 407. Accordingly, separate instructions or findings on that issue are not constitutionally required . . . ." (*Williams*, *supra,* 31 Cal.4th at p. 792.) Defendant's primary argument is foreclosed by *Williams*.

Defendant's secondary argument, that the instruction failed to require a finding that he had serious difficulty in controlling his sexually "predatory" behavior, also lacks merit. In *People v. Hurtado, supra,* 28 Cal.4th 1179, the court concluded "that section 6604 contains an implied requirement that a trier of fact must find beyond a reasonable doubt that the defendant is likely to commit sexually violent *predatory* criminal acts

before the defendant can be committed as a sexually violent predator." (*Id.* at p. 1186.) In that case, the instruction defined the term "sexually violent predator" as "someone who is 'a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' " (*Id.* at p. 1185.) Here, by contrast, the instruction defined the term "sexually violent predator" as "a person who, one, has been convicted of a sexually violent offense against two or more victims for which he received a grant of probation or a determinate sentence, and two, has a diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely that he will engage in sexually violent *predatory* behavior."

Reading both *Williams* and *Hurtado* together, it is clear that the instructions given here adequately conveyed the need for the jury to find that defendant had serious difficulty controlling his sexually violent predatory behavior.

C. Sufficiency of the Evidence

Defendant contends there was insufficient evidence to support the jury's finding that he is a sexually violent predator. Specifically, defendant claims the evidence failed to show that he had "serious difficulty in controlling his behavior" (*Kansas v. Crane, supra,* 534 U.S. at p. 411) or that he was likely to engage in sexually violent criminal behavior that is "predatory" in nature (*People v. Hurtado, supra,* 28 Cal.4th at p. 1182).

When assessing the sufficiency of the evidence in proceedings held pursuant to the SVPA, the appellate court "must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be ' "of ponderable legal significance . . . reasonable in nature, credible and of solid value." [Citation.]' " (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.)

1. Serious Difficulty Controlling Behavior

As noted above, a prerequisite for a civil commitment under the SVPA is proof that the defendant has a mental disorder which causes him or her to have "serious difficulty in controlling behavior." (*Kansas v. Crane, supra,* 534 U.S. at p. 411.) Defendant contends there was insufficient evidence that he had such a mental disorder. He contends the diagnosed mental disorder "was *no more* than a restatement of the fact of two prior qualifying convictions."

Dr. Starr testified that pedophilia "is defined as 'recurrent, intense sexually arousing fantasies, sexual urges, or behaviors" that have "occurred over a period of at least six months," with "at least a five year age difference between the perpetrator and the child or the children." Dr. Maram provided a similar definition. Defendant claims that these definitions do no more than suggest that someone is a recidivist.

However, Dr. Starr testified that her diagnosis was "not only" based on defendant's prior sex offenses. She also referred to his 1997 statement that "eight-year-old girls are mature enough emotionally to enjoy sex"; his acknowledgement that a " 'deep psychological disorientation' " contributed to his behavior; the fact that the conduct underlying the 1989 convictions lasted for a long period of time (approximately one year); and his "early sexual contact with other children." Dr. Starr opined that the pedophilia impaired defendant's volitional control, because he committed sex offenses even while acknowledging that his behavior was wrong and while being aware that he could be incarcerated for that conduct. Dr. Maram provided similar testimony about the basis for his diagnosis.

The record thus reveals that the experts' diagnoses and opinions were not based solely on defendant's commission of prior sex offenses.

2. Likely to Engage in Sexually Violent "Predatory" Behavior

The SVPA requires a finding that if released, the defendant is likely to reoffend by engaging in sexually violent predatory behavior. (*Hurtado, supra*, 28 Cal.4th at pp. 1181-1182.) The SVPA defines a "predatory" act as one that is "directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (§ 6600, subd. (e); see *Hurtado, supra*, 28 Cal.4th at p. 1182.)

Defendant has been involved in criminal sexual behavior involving children for a long time—since 1979 or before. (Cf. *Hurtado, supra*, 28 Cal.4th at p. 1194 [defendant was first adjudicated a mentally disordered sex offender in 1979].) Furthermore, despite legal sanctions imposed in 1979, defendant continued to engage in such behavior, molesting four young boys after being released from a prison term that resulted, in part, from his violation of probation in the 1979 case. (Cf., *ibid.* [history of defendant's parole violations and convictions after adjudication as an MDSO].) Here, however, the victims in this case were not strangers to defendant. (Cf., *ibid*. [all three victims were strangers].) Nevertheless, there is evidence that defendant's relationships with his victims were predatory under the statute. Defendant's relationships with the children could properly be characterized as "casual." One girl was the friend of defendant's stepdaughter, one boy was the son of defendant's business partner, and the other boys were apparently neighbors of defendant. The evidence strongly suggested that defendant "promoted" at least some of these relationships "for the primary purpose of victimization" (§ 6600, subd. (e)): defendant enticed the two 12-year-old girls into sexual acts by "ma[king] it a game" (strip poker); and defendant used pornographic movies to "make them more receptive to sexual contact."

This constitutes "ample evidence to show that defendant was likely to commit future violent sexual acts, and none to indicate that his victims would not include ...

casual acquaintances, or persons cultivated for victimization." (*Hurtado, supra,* 28 Cal.4th at p. 1195.)

E. Cumulative Prejudice

Finally, defendant contends that even if none of the alleged errors, alone, was prejudicial enough to warrant reversal, "they rose by accretion to a level of overwhelming prejudice." (See *People v. Hill* (1998) 17 Cal.4th 800, 844-845.) However, we have found no errors to consider in a cumulative manner.

III. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
RUSHING, P.J.

_____
PREMO, J.